Supreme Court, U.S.
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No. 92-1849

In The

Supreme Court of the United States

October Term, 1992

DENNIS G. LUNDER,

Petitioner,

vs.

CITY OF LOS ANGELES, et al.,

Respondents.

On Petition For Writ Of Certiorari
To The Court Of Appeal Of The State Of California
Second Appellate District Division Two

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1.) Whether respondents, officers of a municipal police department, enjoy the protection of qualified immunity from liability for discretionary actions, not violative of any "clearly established" federal statutory or constitutional rights of the petitioner, which were taken in the good faith performance of their duties as employers and administrators.

2.) Whether petitioner established the existence of a legally cognizable and unbroken chain of causation between the alleged unlawful actions of respondents and the injuries he allegedly suffered.

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BRIEF IN OPPOSITION

STATUTE INVOLVED

42 United States Code, Section 1983:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, or any State or Territory, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law . . . for redress."

STATEMENT OF THE CASE

This action was originally filed by appellant, on July 8, 1983, seeking damages against numerous defendants for alleged civil rights violations. Following a series of successful demurrers by defendants, a fourth amended complaint was filed and, on that basis, the case proceeded to trial on two causes of action (i.e. 42 U.S.C. § 1983 and 42 U.S.C. § 1985(3)) before Los Angeles Superior Court Judge Richard A. Lavine on April 16, 1990.

After some 14 days of trial both sides rested whereupon defendants moved the court for nonsuit and directed verdicts, pursuant to California Code of Civil Procedure Section 581(c), on the ground, among others, that individually-named defendants were entitled to qualified immunity as a matter of law. Said motions were granted as to defendant City of Los Angeles and denied as to all other defendants. Thereafter, the jury was instructed and the case submitted for its consideration.

Following deliberations, the jury returned verdicts in favor of plaintiff and against defendants assistant Chief of Police Robert Vernon and Deputy Chief of Police Ronald Frankle on the first cause of action, violation of civil rights (i.e. § 1983).[1] On the second cause of action (i.e. § 1985(3)), the verdict was against Chief of Police Daryl F. Gates, Assistant Chief Robert Vernon and Deputy Chief Ronald Frankle. All remaining defendants were found to be not liable under either cause of action.

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[1] The jury did *not* find against Chief Gates on the § 1983 cause of action.

Thereafter the jury assessed compensatory damages against all defendants in the amount of $1,110,000.00 and punitive damages of $75,000.00, $65,000.00 and $55,000.00 against defendants Gates, Vernon and Frankle, respectively.

Defendants filed motions for judgment notwithstanding the verdict and for a new trial on May 24, 1990. On June 28, 1990 the motions were orally argued by the parties and the court rendered its written order granting the judgment notwithstanding the verdict and, alternatively, a new trial. Said order was entered on July 2, 1990. The judgment in favor of defendants was upheld by the California Court of Appeal on November 13, 1992 and review was denied by the California Supreme Court on February 7, 1993. Thereafter, the instant petition was filed in this court.

SUMMARY OF ARGUMENT

This case involves an appeal brought by a former command officer of the Los Angeles Police Department (hereinafter, "LAPD") based upon allegations that his civil rights were violated upon the denial of his request for an extension of a personal leave of absence in 1981. Essentially, appellant contended at trial that the denial of a requested extension to his leave of absence was in retaliation for his involvement in the political campaign of a candidate for the Los Angeles City Council. According to his theory, the mere denial of the requested extension *"forced"* him to resign his position as Captain of Police and brought his entire career in law enforcement,

both with LAPD and elsewhere, to an abrupt and irretrievable end.

Simply stated, the overriding issue presented in this case can be summarized as being whether the law contemplates the awarding of over $1,000,000.00 in taxpayers' money to a former civil servant who made the personal decision to voluntarily resign his position as a Captain of Police because of his dissatisfaction with the decision to not extend his leave of absence for a length of time unprecedented in the history of LAPD. Such a windfall verdict was initially rendered by the jury and subsequently overturned, on respondents' motion, by the trial judge. Petitioner now seeks to have the windfall reinstated through a variety of legal arguments. However, as found by the state courts, neither the facts nor the law entitle him to a windfall of such astronomical proportions at taxpayer expense.

At the outset the Court is urged to keep its focus fixed firmly upon the issue of causation. For, regardless of the Court's view regarding any other issues raised in the petition, the single most important deficiency in proof occurred in appellants's failure to establish anything even closely resembling an unbroken chain of causation between the unlawful conduct alleged and the damages sustained.

The decision below was in accordance with the body of law that pertains to the granting of qualified immunity to government employees acting in the good faith performance of the discretionary functions associated with their positions in government. There is no question of law at issue that justifies the grant of a writ of certiorari here.

ARGUMENT

I.

THE TRIAL COURT PROPERLY GRANTED RESPONDENTS' MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT AND, ALTERNATIVELY, FOR A NEW TRIAL

A. Respondents Enjoyed Qualified Immunity As A Matter of Law[2]

As properly determined in the state courts, the individual respondents in this action are entitled to the benefit of qualified immunity from liability under 42 U.S.C. § 1983 in the exercise of their discretionary functions insofar as their conduct did not violate clearly established constitutional rights of which a reasonable person should have known. *Harlow v. Fitzgerald, supra,* 457 U.S. 800, 818; *Anderson v. Creighton* (1987) 483 U.S. 635, 97 L.Ed.2d 523, 107 S.Ct. 3034. Because of the balancing requirement in cases involving First Amendment activities by public employees, at least one federal appellate court has astutely observed:

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[2] In reviewing respondents' argument the court is reminded that the reason for the doctrine of "qualified immunity" is that the actions of government officials should not be unreasonably constrained by the threat of legal challenge. The underlying rationale being, as recognized by this very court, "the need to protect officials who are required to exercise their discretion and the related public interest in encouraging the vigorous exercise of official authority" in the legitimate performance of the duties affixed to their positions in government. *Harlow v. Fitzgerald,* 457 U.S. 800, 807, 73 L.Ed.2d 396 (1982) This case presents a classic example of the continuing need for courts to diligently uphold the assertion of such protection for our public servants.

> "One consequence of case-by-case balancing is its implication for the qualified immunity of public officials whose actions are alleged to have violated an employee's First Amendment rights. *There will rarely be a case for a priori judgment that the termination or discipline of a public employee violated 'clearly established' constitutional rights." Noyola v. Texas Dept. of Human Services,* 846 F.2d 1021, 1025 (5th Cir. 1988). (Emphasis added).

The same court also stated, in another similar case:

> " . . . [R]easonable government officials knowing only that they must not infringe on [employee First Amendment rights], would not necessarily know just what conduct was prohibited." *Hodorowski v. Ray,* 844 F.2d 1210, 1217 (5th Cir. 1988).

In its efforts to define the elements of the qualified immunity defense, this court originally recognized two distinct aspects of the defense, "objective" and "subjective." "The objective element attempted to focus on the extent to which a reasonable person in the position of the defendant should have known of basic, unquestioned constitutional rights" of the plaintiff. *Wood v. Strickland,* 420 U.S. 308, 322, 43 L.Ed.2d 214, 225 (1975). The "subjective" component inquired into the state of mind, specifically the "good faith," of the defendant and attempted to delineate what specific forms of intent were permissible and impermissible. *Id.*

Because of the difficulties of applying the "subjective" or "good faith" portion of the qualified immunity defense, the Court abandoned it in 1982 in favor of a

completely objective analysis. Superseding all prior decisional law on the subject, the Court established in *Harlow v. Fitzgerald,* supra, the current test for qualified immunity in damages actions under 42 U.S.C. § 1983:

> "We therefore hold that government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Id.* at 818, 73 L.Ed.2d at 410.

Under *Harlow* no inquiry into the official's actual state of mind is relevant; "whether an official may prevail in his qualified immunity defense depends upon the 'objective reasonableness of [his] conduct as measured by reference to clearly established law' [citation omitted]. No other 'circumstances' are relevant to the issue of qualified immunity." *Davis v. Scherer,* 468 U.S. 183, 82 L.Ed.2d 139, 147 (1984).

The ultimate legal question is whether each defendant acted in an objectively reasonable manner:

> "At common law, in cases where probable cause to arrest was lacking, a complaining witness's immunity turned on the issue of malice, which was a jury question. Under the *Harlow* standard, on the other hand, an allegation of malice is not sufficient to defeat immunity if the defendant acted in an objectively reasonable manner . . . Respondents will not be immune if, on an objective basis, it is obvious that no reasonable competent officer would have concluded that a warrant should issue; but if officers of reasonable competence could disagree on this issue,

> the immunity should be recognized." *Malley v. Briggs*, 475 U.S. 335, 89 L.Ed.2d 271, 278 (1986) (footnote omitted)

Malley v. Briggs addressed the question of the availability of qualified immunity in a false arrest context, where the arrest allegedly flowed from a police officer seeking and eventually obtaining the issuance of a warrant on the basis of what the officer should have known was not probable cause. As this court pointed out, the alleged malice of the defendant officer, crucial at common law, was irrelevant to the question of § 1983 immunity. The sole question for § 1983 immunity purposes was whether no reasonably competent officer would have concluded that the warrant should be sought, with the understanding that immunity should be granted if officers of reasonable competence and experience could disagree on the issue.

As *Malley v. Briggs* makes clear, the question of whether the individual officers' conduct was objectively reasonable is one of law, not fact, and is properly addressed by the court, not the jury. *Id.; Stein v. Board of City of New York*, 792 F.2d 13, 17-18 (2d Cir. 1986).

While appellant certainly disputes the appropriateness of the actions taken by respondents and can offer his view as to how their exercise of discretion should have been different, the legal question remains whether similarly situated police department managers of reasonable competence could disagree about the appropriate actions to take regarding appellant under the circumstances presented. If reasonable minds could differ, one must infer that respondents acted reasonably within the bounds of

the discretion accorded them as high level managers in LAPD.

Again, specifically, the relevant inquiry here is whether respondents could have reasonably believed that their challenged conduct to be lawful in light of the information that they possessed at the time of their actions. *Anderson, supra.* The answer as to each respondent is clearly yes. Accordingly, under *Anderson,* they are each entitled to qualified immunity for their actions.

At trial appellant had the burden of showing that respondents' conduct violated his "clearly established" federal constitutional or statutory rights. *Tomer v. Gates,* 811 F.2d 1240, 1241 (9th Cir. 1987). See also *Lutz v. Weld County School Dist.,* 784 F.2d 340, 342-343 (10th Cir. 1986); *Abel v. Miller,* 824 F.2d 1522 (7th Cir. 1987). Moreover, the cases hold that to find a "clearly established" right authority must be presented, *by plaintiff,* showing that the right in question was "clearly established" by the United States Supreme Court, the appropriate Court of Appeals or by the reviewing court itself:

> "[I]n the ordinary instance, to find a clearly established constitutional right, a district court must find binding precedent by the Supreme Court, its court of appeals or itself. In an extraordinary case, it may be possible for decisions of other courts to clearly establish a principle of law. For the decisions of other courts to provide such 'clearly established law,' these decisions must both point unmistakably to the unconstitutionality of the conduct complained of and be so clearly foreshadowed by applicable direct authority as to leave no doubt in the mind

> of a reasonable officer that his conduct, if challenged on constitutional grounds, would be found wanting." *Ohio Civil Service Employees Ass'n v. Seiter*, 858 F.2d 1171 (6th Cir. 1988).

The trial court was correct in ruling that appellant did not make the requisite showing of "clearly established" law on the issues presented in this case.

CONCLUSION

The state court decision did not involve an important question of federal law which has not been, but should be, settled by this court; nor is there a conflict among federal courts on the issues before the court. The opinion of the California Court of Appeal was just, proper and in accord with federal law as previously decided by this court. For the foregoing reasons, the petition for certiorari must be denied.

DATED: June 16, 1992

Respectfully submitted,

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